IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 75

FEDERAL TRADE COMMISSION,
Petitioner,

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorable the Supreme Court of the United States:

Comes now Motion Picture Advertising Service Company, Inc., the appellee in the above entitled cause, and presents this, its petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

The majority opinion of the Court rendered on February 2, 1953 is erroneous and contrary to the law and the evidence, and prejudicial to the rights of respondent in the following respects:

A.

The Court erred in holding that it is for the Commission and not for the courts to determine whether a method of competition is unfair under Section 5(a) of the Federal Trade Commission Act.

The majority opinion states:

> "The precise impact of a particular practice on the trade is for the Commission, not for the courts, to determine."

This holding is directly in conflict with the holding in *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, in which your Honors said:

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not for the Commission ultimately to determine as a matter of law what they include."

In *National Biscuit Company v. Federal Trade Commission*, 299 F. 738, the Second Circuit Court of Appeals said:

> "Whatever may be the exact meaning of the phrase 'unfair methods of competition' it is now settled that it is for the courts and not for the Commission to determine as a matter of law what is and what is not included in the phrase. This ruling is not avoided by stating as a finding of fact what is a mere conclusion of law."

If the courts are to be bound by the findings and conclusions of the Commission, judicial review is a mere vain formality.

It is indispensable to the Government's case to establish that either the actual or the probable effect of con-

tracts in excess of one year is to substantially lessen competition, or tends to create a monopoly. The finding by the Commission to that effect was a mere conclusion of law and was not supported by any evidence whatever.

B.

The Court erred in finding that it has become standard practice to enter into a theatre screening agreement for a term of one year. In its opinion the majority said:

> "These contracts run for terms up to five years, the standard one being for one year."

The Court also said:

> "The Commission found that the term of one year had become a standard practice and that the continuance of exclusive contracts so limited would not be an undue restraint upon competition in view of the compelling business reasons for some exclusive arrangement."

In making these statements the Court confused the Commission's finding as to the standard term of a theatre screening agreement with the standard term of an advertising contract. In Paragraph Five of its Findings of Fact the Commission said:

> "In the conduct of its business the respondent enters into written screening agreements with exhibitors and theatres for a maximum period of five years with the majority being written for two-year and one-year terms. It was estimated that about 25% of respondent's screening agreements were for a period of five years. * * * " (R. Vol. I, 58-59)

and, in Paragraph Six of its Findings of Fact, the Commission said:

> "In connection with the sale or distribution

> of respondent's screen advertising service, the respondent enters into contracts with advertisers usually for a period of one year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theatres weekly or every other week for a period of usually one year. * * * " (R. Vol. I, 59)

Not only did the Commission not make a finding of fact that the standard theatre screening agreement is for a term of one year, but all of the undisputed evidence is that since the beginning of the industry more than thirty years ago, all distributors alike have entered into exclusive theatre screening agreements for terms of from one to a maximum of five years, and that about 25% of respondent's contracts run for a term of five years.

The exhibits in the record show that there are approximately 20,306 theatres in the United States, and about 12,676 exhibited film advertising. Respondent has agreements with 4,096, of which 2,493 contain the exclusive clause. Of these 2,493, 594 run for one year, 491 for two years, 302 for three years, and 1,106 for five years.

Accordingly, the majority opinion is based upon an erroneous statement of the Findings of Fact as made by the Commission.

C.

The Court erred in holding that there was substantial evidence to support the finding of the Commission that respondent's exclusive contracts unreasonably restrain competition and tend to create a monopoly.

The finding of the Commission is not supported by any evidence whatever.

The record of nearly 2,000 pages shows indisputably that the present method of doing business is necessary to the proper conduct thereof, and is beneficial to the distributors, theatres, advertisers and the public. There was no evidence whatever that any competitor of respondent was forced out of business because of respondent's exclusive contracts.

The record establishes without contradiction that the reasons respondent's competitors were unable to obtain theatre contracts was not because of respondent's exclusive screening agreements, but was because of their refusal to offer to pay as much as respondent for the screen privilege, the inferior quality and character of their films, the intermittent type of advertising service offered which was not sufficiently remunerative to the theatre, and the fact that their producer was unable to secure raw supplies during the war years and, therefore, had no films to sell.

The only witnesses placed on the stand by the Government were T. P. Grinspan, J. A. Pope, Nobles C. Campbell, W. Bill Reichart, Rene P. Karrigan and Robert Weigand. Grispan, Pope and Campbell were distributors of films purchased from Parrot Distributing Company. They all admitted that the films were of inferior quality, were not acceptable to the theatres, and that during the war years, Parrot Distributing Company was unable to secure raw film supplies. Not a single one testified that he was forced out of business because of respondent's exclusive contracts. W. Bill Reichart testified, to the consternation of the Government, that exclusive contracts were beneficial to all concerned, including the theatre, the distributor and the advertiser. He further testified that he had the first

opportunity to obtain some theatre contracts in Texas with a chain of theatres, and that the reason he did not secure the contracts was because he bid only $3.00 per ad per performance, whereas respondent bid $7.50 per ad per performance, and that he was not willing to meet the offer. Respondent secured this contract subsequent to the rejection of Reichart's offer by the theatre.

Karrigan and Weigand were officers of Commerce Pictures Company in New Orleans. Not only were they not forced out of business, but they both stated that their Company was able to get wider coverage by virtue of respondent's theatre contracts, and that respondent never refused to exhibit films for them on theatre screens under contract. All of the witnesses for both the Government and respondent testified that the theatres generally awarded the contract to the company that made the highest bid for the screen, and distributed the best quality of the advertising films. Every theatre exhibitor who testified stated that he would rather give up film advertising than do business with more than one company at the same time. Many theatre owners stated that they insisted upon contracts for a longer term than one year, or otherwise would not offer their screens for advertising. The record establishes without contradiction the necessity for exclusive contracts for terms in excess of one year. Advertising agents all agree that they need to be assured of space for longer than one year before they will use this medium for their client's advertising.

It was conceded by everyone that all competitors alike from the very beginning of the industry more than thirty years ago have secured exclusive screening agreements for periods of from one to five years.

It was also conceded by all witnesses alike that there is and always has been free, open, active and substantial competition among all distributors for the securing of theatre screening agreements. . Theatres frequently change distributors at the termination of the contract. The 1,106 five-year contracts of respondent constitute contracts with only 5½% of the total theatres in the United States, and only 8.7% of the theatres which will display screen advertising. The 1,899 contracts of respondent that run for terms in excess of one year constitute contracts with only 9% of the total theatres in the United States, and only 15% of the theatres which will display screen advertising.

We respectfully submit that this falls far short of establishing any monopoly in respondent.

Both the Commission and the Court undertake to add all of the exclusive contracts of respondent with those of the other three distributors who were respondents in the other cases, and then say that the four respondents together control 75% of the market. In the first place, many of the contracts are for a term of one year, which are upheld as legal. In the second place, since no conspiracy has been charged, respondent's contracts must be viewed separately in order to determine whether there is a monopoly, and we submit that the figures show that respondent has no control of the market. If the Commission were permitted to add together all of the contracts of all competitors to determine the issue of monopoly, it would be justified in rendering anti-monopoly orders against a mere tyro with a small percentage of the business, on the ground that he, together with all of his competitors, approximate 100% of the total industry.

We, therefore, submit that the findings of the Commission that contracts for longer than one year unduly restrain competition or tend to create a monopoly are not supported by any evidence whatever.

In *Federal Trade Commission v. Gratz*, 253 U.S. 421, your Honors said that the words "unfair methods of competition" are clearly inapplicable to practices never heretofore regarded as opposed to good morals or as against public policy, and further, that the Federal Trade Commission Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

D.

The Court erred in holding that respondent's exclusive contracts should be restricted to a term of one year in the interest of the public.

The principle decided in this case is very far-reaching. It not only prevents the owner of property from leasing it for a reasonable period of time, but also destroys the value of the property that is the subject of the contract. No one has ever contended that a theatre owner would not have the right to lease his lobby, his ground floor stores, his basement, or his roof for advertising purposes for as long as he wants. Here, for the first time, the Court has decided that a theatre owner cannot lease his screen for a period of more than one year. The order restricts one class of persons (trailer-ad distributors) from buying what another class (theatre owners) may want to sell, viz., a lease of the theatre screen for more than one year.

This is not a case where the bargaining power is

vested in respondent. The terms of the contract are not dictated by respondent but by the theatre exhibitors who have screen space to lease. The effect of the Court's decision here is to upset a long-standing and widely-practiced business arrangement. If the contracts are limited to one year, obviously the theatres (who are not parties to this suit) will have to take less for their screen privilege. Respondent cannot afford to pay as much consideration for a one-year contract as for a longer contract. The decision will have the effect of destroying the value of the screen privilege, and will thus lessen competition and not increase it.

E.

The Court erred in holding that respondent's exclusive contracts unreasonably restrain competition and tend to create a monopoly, and are "unfair methods of competition" under Section 5(a) of the Federal Trade Commission Act.

There is no charge of any combination or conspiracy among the four respondents, or between any of them to restrain trade. There is and always has been free, open, active and substantial competition among all distributors in the securing of theatre screening agreements. Respondent, acting independently of its competitors, has undertaken to negotiate theatre screening agreements for more than thirty years past with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition. Some theatre owners demand a contract for one year. Others demand a longer term contract. Many of them demand guarantees payable in advance. Many theatre owners testified that they would

rather forego the advantages of screen advertising if the contracts are limited to a term of one year. We, therefore, submit that the contracts of respondent do not unreasonably restrain competition, and are not unfair methods of competition. The screening agreements are not longer than business necessity dictates for the execution of effective advertising programs. This method of doing business is not some new scheme adopted by respondent to stifle competition. In *Federal Trade Commission v. Gratz*, 253 U.S. 421, 428, your Honors said:

> "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

Here is a case where the business men, including theatre owners and distributors alike, have decided from the very inception of the industry that theatre screening contracts should run for terms of from one to five years. But the Commission undertakes to substitute its judgment for that of the business men and to declare illegal contracts in excess of one year. The cease and desist order will lessen competition and destroy the value of the screen privilege. It will also be disadvantageous to the theatre, the advertiser, the distributor and the public.

As pointed out by Commissioner Mason in his dissenting opinion, the chief benefactor of motion picture advertising is the small theatre owner, and the revenue thus obtained by the small theatre owner is a subsidy to keep him alive. The cease and desist order will hurt him by destroying the value of his screen privilege, and by preventing him from leasing it on the terms that he sees fit. It cuts him down to a one-year lease instead of a longer one for which he can obtain more money.

The order also hurts the advertiser by destroying the value of motion picture advertising as a medium. Advertisers need to be assured of space for a longer term than one year in order to plan their advertising, particularly since the term of the screen privilege and the term of the advertising contract overlap each other.

The testimony is uncontradicted that theatres frequently change distributors from time to time. There were introduced in the record forty-nine letters received by respondent, twenty-nine of which were notices from theatres that their screens had been taken away from respondent and given to competitors, and twenty of which were notices from theatres that their screens had been taken away from competitors and given to respondent. (R. Vol. II, 84)

The majority opinion states:

> "It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is, therefore an 'unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act."

The record fails to establish that respondent has sewed up the market. The testimony is uncontradicted that about one-third of respondent's contracts come up for renewal each year, so that the average length of the agreements is about three years. Under the circumstances shown to exist, competitors of respondent have the right to, and actually do, compete for their contracts at all times, and are able to take away from respondent a third of its contracts each year.

We respectfully submit that this uncontradicted testimony fails to establish that respondent has sewed

up the market, and foreclosed to competitors available outlets.

We, therefore, submit that respondent's contracts do not unreasonably restrain competition.

We also submit that respondent's contracts do not tend to create a monopoly. As shown above, respondent's contracts that run for more than one year constitute no monopoly of the theatre screens of the United States. Out of a total of 20,306 theatres, respondent has only 491 two-year contracts, 302 three-year contracts, and 1106 five-year contracts. This falls far short of any monopoly.

We respectfully submit that the Government has completely failed to establish that the proposed cease and desist order is necessary to increase competition, or to prevent a monopoly.

In *Standard Oil Company v. United States*, 337 U.S. 293, Justice Jackson said:

> "If the courts are to apply the lash of the antitrust laws to the backs of business men to make them compete, we cannot in fairness apply the lash whenever they hit upon a successful method of competing."

We respectfully submit that a rehearing should be granted.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the judgment handed down on February 2, 1953 be set aside,

and the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF COUNSEL

I, counsel for the above named Motion Picture Advertising Service Company, Inc., do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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PROOF OF SERVICE

I, the undersigned counsel for Motion Picture Advertising Service Company, Inc., do hereby certify that I have this day served copies of the above and foregoing petition for rehearing on the Solicitor General of the United States by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, February ....., 1953.

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LOUIS L. ROSEN